Office-Supreme Court, U.S.
FILED
AUG 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1905

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN CHEMICAL CORPORATION, A Delaware Corporation, [Successor In Interest By Merger To Kollsman Instrument Corporation],

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S BRIEF IN REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

PAUL A. TESCHNER
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-0346
Counsel For Petitioner

Of Counsel:
TESCHNER PROFESSIONAL CORPORATION
39 South LaSalle Street
Chicago, Illinois 60603

18 August 1983

Pandick Press Midwest, Inc. Chicago • 454-7600

TABLE OF CONTENTS

PAGE

I. Contrary To Respondent's Assertions, Petitioner Never Had Its "Day In Court" With Respect To Its 1964 Net Operating Loss And Its Carryback To 1961; And The Record Is Directly Contrary To Respondent's Said Assertions 2

II. Contrary To Respondent's Assertion, Petitioner Never Agreed To Accept A Deduction For 1967 [Rather Than 1966] Instead Of Seeking A Refund On Account Of Its 1963 Net Operating Loss And Its Carryback To 1960; And The Record Is Directly Contrary To Respondent's Said Assertion 5

CONCLUSION 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1905

SUN CHEMICAL CORPORATION, A Delaware Corporation, [Successor In Interest By Merger To Kollsman Instrument Corporation],

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S BRIEF IN REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION*

Respondent denies that Petitioner has been deprived of procedural due process of law because (1) it has had its "day in court" with respect to the cause of action based upon its 1964 net operating loss (and its carryback to 1961), and (2) the revenue agents allowed Petitioner a 1967 deduction which

* Page xi of the Petition For Certiorari is a Rule 28.1 listing of all affiliates of Petitioner. That listing is still accurate and complete and no changes have occurred therein since the Petition For Certiorari was filed.

—"according to its refund claim and Tax Court pleadings"—Petitioner agreed to accept instead of pursuing its cause of action based upon its 1963 net operating loss (and its carryback to 1960). Those denials are without substance and are directly contrary to the Record in this case.

I

CONTRARY TO RESPONDENT'S ASSERTIONS, PETITIONER NEVER HAD ITS "DAY IN COURT" WITH RESPECT TO ITS 1964 NET OPERATING LOSS CAUSE OF ACTION AND ITS CARRYBACK TO 1961; AND THE RECORD IS DIRECTLY CONTRARY TO RESPONDENT'S SAID ASSERTIONS

We would have a different case, of course,—indeed, one not even worth pursuing in the first place—if Petitioner were merely seeking to re-litigate what was already decided in the 1961 Tax Court case. That Respondent basically misconceives this particular case, however, and has confused it with that different case, is disclosed by the following portions of the Memorandum For The United States In Opposition:

Page 3: "On November 19, 1965, *** petitioner filed a petition with the Tax Court for redetermination of deficiencies for the taxable years 1961 and 1962 to account for the events described above [*i.e.,* whether the $1,708,000 was properly included in Kollsman's 1964 income]. ***Ultimately the Tax Court decided the case based on the agreement and stipulation of the parties that petitioner's inclusion of the full $1,708,000 of receivables in its 1964 income was proper (Pet. App. A50-A53)—a claim that was inconsistent with the claim of a loss that could have been carried back to 1961 from 1964."

Page 7: "*** Petitioner had raised this precise issue—whether

> the anticipated contract income should be excluded in 1964 with a resulting loss to be carried back to 1961—before the Tax Court, by amendment to its petition, 'in order to allow a complete determination of [p]etitioner's Federal income tax liabilities for ***1961 ***' (Pet. App. A46) ***. The Tax Court entered its decision regarding the 1961 year pursuant to the agreement and stipulation of the parties, and petitioner's attempt to litigate the same issue in the Court of Claims plainly was precluded by res judicata. ***"

Page 8: "*** Here the issue of whether petitioner properly reported its 1964 income from the Air Force contract, the fundamental question relative to its 1961 refund claim, was actually raised in the Tax Court and there conceded by petitioner. *** Petitioner had its day in court with regard to its 1961 refund suit, where it conceded the issue it seeks to raise here. ***"

Page 8, note 7: "*** [T]he amended Tax Court petition in this case brought the loss and carryback years before the court and, indeed, petitioner represented to the Tax Court that no net operating loss was warranted in 1964 by reason of the Air Force contract."

The gist of all those assertions is that Kollsman has indeed had its "day in court" with respect to its claim that it incurred a net operating loss of $1,708,000 in 1964. That simply is not true. Although Kollsman did *attempt* to raise as an issue in the 1961 Tax Court case the question of whether it correctly included said $1,708,000 in its 1964 income, the Commissioner of Internal Revenue rejected that attempt. In his letter of May 9, 1969—which covered settlement documents to be filed in the 1961 Tax Court case—the Chicago Regional Counsel of the Internal Revenue Service wrote in part (*Petition For Certiorari: App. K, A84-A86; App. C, A50-A51*):

"There are enclosed an original and four copies each of a stipulation and decision which reflect a basis for settlement proposed in the above-entitled case. Please execute the original and three copies of each and return them to this office at the earliest practical date. The extra copies are for your files.

* * *

"On September 12, 1967, the petitioner filed an amendment to petition in the subject case. In that document, petitioner alleged that it had erroneously included in its total income for the taxable year ended 1964, the amount of $1,708,000.

* * *

"In the amendment to petition filed on September 12, 1967, it is alleged in paragraph 2.(n)(5)(d) that the petitioner in computing its taxable income for 1966 eliminated from its assets and charged off the amount of $1,708,000.00. Since the year 1966 is not before the Court, we have not given any consideration to the correctness of deducting the $1,708,000.00 in 1966 or in any other year. Our sole consideration on this issue is whether or not 1964's net operating loss was understated by the $1,708,000.00.

"In conferences with representatives of the Appellate Division and this office, the petitioner was requested to prove its allegations concerning the $1,708,000.00. It is the respondent's view that satisfactory evidence was not submitted and accordingly, respondent would not agree that the error as alleged in the petition was committed."

* * *

II

CONTRARY TO RESPONDENT'S ASSERTION, PETITIONER NEVER AGREED TO ACCEPT A DEDUCTION FOR 1967 [RATHER THAN 1966] INSTEAD OF SEEKING A REFUND ON ACCOUNT OF ITS 1963 NET OPERATING LOSS AND ITS CARRYBACK TO 1960; AND THE RECORD IS DIRECTLY CONTRARY TO RESPONDENT'S SAID ASSERTION

The courts below have held that no valid claim for refund supports Petitioner's cause of action based upon its 1963 net operating loss and its carryback to 1960. Their theory has been that Petitioner had agreed—in its refund claim and in its 1961 Tax Court case—that its said claim was merely "protective" and would not be pursued if Petitioner would be allowed a deduction for *1967*. Respondent has embraced that same error [Memorandum For The United States In Opposition]:

> *Page 8:* "*** With regard to its 1960 refund claim *** petitioner was allowed the claimed 1967 deduction, which, according to its refund claims and Tax Court pleadings, petitioner always believed represented the proper adjustment for its anticipated but unrealized income from the contract. ***"

Once again—just as in the case of the 1964 net operating loss cause of action—the record is absolutely contrary to Respondent's said assertion. Assuming *arguendo* the Petitioner would have a "basis" in its claim against the Air Force in the first place (because it correctly included the cost overruns in its income for 1963, the question it seeks to have decided in this case), Petitioner has always taken the position that *1966*—not 1967—would be the proper year for any deduction. Neither the Tax Court pleadings nor the refund claim support Respondent's premise to the contrary and they are—in fact—directly contrary to it:

(1) Claim For Refund of 1960 income taxes *(Petition For Certiorari: App. L, A88; App. C, A45):*

* * *

"Accordingly, in computing its taxable income for 1966, the Taxpayer eliminated from its assets the amount of $4,359,000 and charged off the claim which it had recorded against the United States Air Force. The amount of $4,359,000 was the adjusted basis of said portion of the claim as determined by the application of Section 1011 of the Internal Revenue Code of 1954.

"Although the Taxpayer believes that the aforementioned treatment is proper in the circumstances, it also recognizes the alternative possibility that the following provisions of Reg. Sec. 1.451-1(a) might apply:"

* * *

(2) Amended Tax Court Petition *(Petition For Certiorari, App. C, A47-A48):*

* * *

"(c) During 1966, the taxpayer attempted to procure from the United States Air Force an admission affirming that it did in fact owe the Petitioner, *inter alia,* the aforesaid amount of $1,750,497; but this attempt was insufficient when on January 10, 1966, a determination was made by the Contracting Officer that Petitioner only had a right to receive the amount $42,497 on account of the aforementioned claim of $1,750,497 which Petitioner had included in its 1964 total income.

"(d) Accordingly, in computing its taxable income for 1966, Petitioner eliminated from its assets the amount of $1,708,000, the difference between its claim of $1,750,497 and the amount of $42,497 determined to be owing Petitioner by the Contracting Officer, and charged off the $1,708,000 claim which it had recorded against the United States Air Force. The amount of $1,708,000 was the adjusted basis of said portion of the claim as determined by the application of Section 1011 of the Internal Revenue Code of 1954.

"(e) Although the Petitioner believes that the aforementioned treatment is proper in the circumstances, it also recognizes the alternative possibility that the following provisions of Reg. Sec. 1.451-1(a) might apply:"

* * *

CONCLUSION

For the reasons expressed in the Petition For Certiorari, Petitioner has been deprived of procedural due process of law by the courts below. It has never had its "day in court" with respect to either of its causes of action at issue in this case. Respondent's Memorandum In Opposition is based upon a misunderstanding of the facts of this case and is absolutely contrary to the Record. Certiorari should be granted.

Respectfully Submitted,

PAUL A. TESCHNER
39 South LaSalle Street
Chicago, Illinois 60603
(312) 332-0346
Counsel For Petitioner

Of Counsel:
TESCHNER PROFESSIONAL CORPORATION
39 South LaSalle Street
Chicago, Illinois 60603

18 August 1983